U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 17Jul2002

Case No: 2002-INA-00082

In the Matter of:

SAINT ANTHONY CARE HOME
Employer

On Behalf of:

MARISSA GARCIA
Alien

Appearance: Jack Golan, Esq.
for the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Marissa Garcia ("Alien") filed by Employer, Saint Anthony Care Home ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R., Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On January 13, 1998, the Employer filed an application for labor certification to enable the Alien to fill the position of Food Service Worker/Cook in its Board & Care Facility.

The duties of the job offered were described as follows:

"Prepare, season, cook & serve nutritional breakfast, lunch & dinners to residents of board and care facility. Maintain kitchen clean and orderly. Prepare/plan weekly menu for employer's approval, incl. salads, soups, sandwiches, meats, vegetables, sauces, gravies & casseroles. Bake bread, rolls, cakes desserts and pastry. Prepare/cook meals for patients requiring special diets. Read menu to estimate food requirements, order food or procure food from storage & freezer. Measure and mix ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizer. Bake, roast, broil and steam meats, fish, vegetables, and other foods. Add seasoning to foods during mixing or cooking. Carve meats, portion food on serving plates, add gravies and sauces, and garnish servings to fill orders. Wash, peel, cut and shred vegetables and fruits to prepare them for use. Cut, trim, and bone meat prior to cooking. Maintain kitchen area clean; wash dishes, pots and pans, and clean refrigerator, stove and storage areas." (Some spelling corrections made)

Two years experience in the job was required and a high school education. Wages were $11.55 per hour. No special requirements. The applicant supervises 0 employees and reports to the Administrator. (AF-65-95)

On March 23, 2001, the CO issued a NOF denying certification. The CO questioned whether a current job opening existed and whether there is a business operated by employer within the U.S. The CO citing Section 656.20(c)(8) further stated: "In this instance the employer is an adult residential home licensed for

six beds. The job being petitioned for is that of cook. However, it is not persuasive that such a small facility would have its own full-time cook...The employer's rebuttal must establish conclusively that the job opportunity described on the ETA 750A does in fact exist and that the employer has a job opportunity for a skilled worker." Corrective action required employer to provide employer's current license showing the size of each facility, numbers of beds and type of patients that the employer is licensed to care for; documentation of number of residents in the home, the number of staff and position held by each, record of salaries paid to care giver workers, show who has been doing the cooking, the cooking schedule and which worker is the cook. (AF-61-64)

On April 21, 2001, Employer forwarded its rebuttal through counsel, which stated that Employer is now the licensee of three residential care facilities, all licensed by the State of California for the developmentally disabled. The job of cook was for the twelve residents of two residential care facilities. The two years experience for a cook is needed because the General Licensing Requirements must be strictly followed. Employer listed four full time employees and three part time by names. The current caregiving duties of the Direct Support Professional staff is compromised; they will be better able to fulfill their duties with a full time cook. Alien is not working with Employer yet. Under the current system, the husband and son buy groceries and other food requirements from grocery stores; they would be freed to do caregiving duties. Copies of licenses were furnished.(AF-13-60)

On May 7, 2001, the CO issued a Final Determination denying certification, stating: "...[E]mployer submitted the application for labor certification specifically stating the location where the alien will work as one location...and the nature of the business was 'Board & Care Facility Licensed for 6 non-ambulatory residents/developmentally disabled.' This is the employer's sworn statement on Form ETA 750A. The employer also advertised the job without reference to two facilities that the cook was to go back and forth between. If there had been any information provided to indicate that the job was to require the cook to go between two facilities to cook for two separate groups of six patients at two different locations, the local office could have questioned the work schedule and the local office could have assured that the job requirements to cook at two separate homes for the different groups of patients was specified in the advertisement. ..The information in the rebuttal is tantamount to a proposal to change the job offer to a position that requires cooking for twelve residents at two locations. However, it is too late to change the requirements for the job for this application. We cannot find that it was a harmless omission that the job offer was to be so different than stated on the application and in the

advertisement. Moreover, the rebuttal does not provide any information as to how much time is currently spent cooking at either facility or will be spent at either facility. The employer was asked to show the cooking schedule and to show how the cook has been in a full-time position. The employer in rebuttal has instead referred to the present as limited to 'fast food type of cuisine, those that do not need long preparation and cooking' and that one of the reasons why she is petitioning for a cook is to feed the 'residents with adequate and nutritional food'. However, based upon the California regulated food service requirements as submitted by the employer as an attachment to the rebuttal, it must be presumed that the required meals and snacks have been being served by both licensed facilities. The rebuttal does not show in any specific manner how much time is currently spent on meal preparation at either facility. The rebuttal indicates that the alien is not yet working for the employer but that if and when she will be certified she will begin the job. However, where the proposed position is to be newly created after the granting of foreign labor certification, and the employer has not provided information sufficient to show how the job is the same job as described on the application for labor certification, or is a full-time position, we cannot find that the employer has shown how the labor certification position is one that is truly open to any qualified U.S. worker." (AF-10-12)

On June 7, 2001, the Employer filed a request for review of denial of labor certification. (AF-1-9)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc). Although written assertions constitute documentation that must be considered under Gencorp, 1987-INA-659 (January 13, 1988)(en banc), bare assertions without supporting evidence are generally insufficient to carry an employer's burden of proof. (Sang Chung Insurance Agency, 2000-INA-259 (January 11, 2001) On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 1988-INA-32 (April 5, 1989)

As a preliminary matter, we note that the date of acceptance for processing by the CO was January 13, 1998 while the date of the NOF was March 23, 2001, over three years afterward. Employer is not to be totally blamed for stating in his rebuttal the current situation of his business which includes three homes for caregiving, whereas at time of application only one was in being.

However, the record is not clear as to whether Employer was given the opportunity at the period of original application to list his expansion plans. We note, moreover, that Employer now has expressed interest in even further expansion.

While the CO had reason to inquire about the need for a full-time cook for only six disabled boarders as was the CO's apparent understanding from the original ETA under the "totality of circumstances" criteria set out in Carlos Uy,III,1997-INA-304 (March 3, 1999)(en banc), it is not clear that an effort was made to understand Employer's needs and business based on Employer's rebuttal. An option the CO could have pursued following rebuttal is to have issued a second NOF with the "new" requirements giving Employer an opportunity to rebut, or readvertise. Under the circumstances, we believe remand is appropriate. The CO should either accept the Employer's facts on rebuttal and determine whether or not certification should be granted, or issue a second NOF to Employer. The CO is not preempted from inquiring as to whether or not Employer has used the full-time services of a cook since date of application, and alien's current employment status as a part of a "totality of circumstances" inquiry into the bona fides of the job offer.

ORDER

The Certifying Officer's denial of labor certification is VACATED and the matter remanded.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.